92-1743

NO.

Supreme Court, U.S.
FILED
APR 2 - 1993
OFFICE OF THE CLERK

In the
Supreme Court of the United States

October Term, 1992

GARY M. BOUGERE,

Petitioner,

v.

CARLO F. FERRARA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Regel L. Bisso
Bar Roll NOl. 13775
610 Baronne Street
New Orleans, LA 70113
(504) 524-6221

Bonnie L. Zakotnik
Bar Roll No. 13775
4501 Canal Street
New Orleans, LA 70119
(504) 486-6011

Attorneys for Petitioner Gary M. Bougere

65 pp

Questions Presented

(1) Can a state executive official claim any immunity for malicious slander committed outside the course and scope of duty?

(2) Can a state executive official claim any immunity for malicious slander committed within the course and scope of duty?

List of Parties

The petitioner and the plaintiff below is Gary M. Bougere. Susan M. Dugas was also a plaintiff in the District Court. The respondent is Carlo F. Ferrara. The City of Harahan, Louisiana was also a defendant in the District Court.

Table of Contents

Questions Presented i

List of Parties i

Table of Contents ii

Table of Authorities iii

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

ARGUMENT 7

CONCLUSION 18

APPENDICES . . . . . A

Table of Authorities

Cases:

Hafer v. Melo, 112 S.Ct. 358 (1991) . .5-8

Dugas, et al v. The City of Harahan, et al, 978 F. 2d 193 (5th Cir. 1992) . . . 8

Stepanian v. Addis, 669 F.2d 1046 (11th Cir. 1983) 5,8.9

Marrero v. City of Hialeah, 625 F.2d 499 (5th Cir. 1980) cert. denied, 450 U.S. 913 . . . . . 6,8.9

Statutes:

42 U.S.C. § 1983 . . . . . 6,7 8

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, which was decided on the Summary Calendar and is reported at 978 F.2d 193 (5th Cir. 1992) is reprinted in Appendix ("App.") B. A rehearing was denied and the denial is reprinted herein. App. A.

The Minute Entry of the U.S. District Court for the Eastern District of Louisiana is reprinted in Appendix C. The final Judgment of the District Court is reprinted in Appendix D, and the Jury Interrogatories are reprinted in Appendix E.

JURISDICTION

The judgment of the Court of Appeals denying Petitioner's Request For Rehearing and Suggestion For Rehearing En Banc was denied on January 4, 1993. The

jurisdiction of this Court rests upon 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

None.

STATEMENT OF THE CASE

Gary Bougere, Petitioner, was elected Mayor of Harahan, Louisiana and began serving his term on January 1, 1987. He resigned from office December 31, 1987, due to bitter and vicious political disputes generated by his political opponents.

Mr. Bougere and his family were the target of an organized slander campaign during his term of office, but due to Bougere's status as a public official these malicious publications were not actionable. Certain citizens of Harahan signed a petition to recall Mr. Bougere in an election, but Mr. Bougere's resignation

obviated that.

In an effort to spare his family further emotional strain, embarrassment, and humiliation, the Bougeres relocated to Tampa, Florida following his resignation. He successfully passed the Florida Bar Examination, and submitted an application to practice law before the Florida State Bar Association in January, 1989.[1] This application included the names of Mr. Bougere's former employers, including the City of Harahan. The Florida Board of Bar Examiners (hereinafter "FBBE") sent a questionnaire to the City of Harahan.

Carlo Ferrara, respondent, a political enemy of Bougere and then Mayor of Harahan, received the questionnaire addressed to the city and completed and

---

[1] Mr. Bougere has been a licensed attorney in Louisiana since 1979.

returned the form. Later, Ferrara supplemented his responses by letter and telephone interview. Mr. Ferrara told the FBBE that Mr. Bougere was dishonest, that he was not thorough in fulfilling obligations, that he was not trustworthy, that he had an alcohol abuse problem, that he was delinquent in financial obligations and that he was experiencing mental disorders.

Bougere, a citizen of the state of Florida, filed a lawsuit in the Eastern District of Louisiana alleging defamation against defendants, The City of Harahan, and Carlo F. Ferrara, individually and as Mayor. Diversity jurisdiction was invoked pursuant to 28 U.S.C. § 1332 (1).

The case was tried before a jury which found the communications made by Ferrara to be false and malicious. M r .

Ferrara was questioned at length during trial concerning the basis of his defamatory statements and the source of his knowledge. He admitted that his response to the FBBE was based solely on personal knowledge gained prior to his own election as Mayor, and consisted of opinion and recollection. He admitted further that his information was derived from attending council meetings in 1987 as a private citizen, at which time he held no official position with the city; that he made no use of city records in preparing his response; that his response was not based on Bougere's employment by the city; and that he took no steps to verify any of his allegations. The slanderous comments were based on what he had "heard" from other people, although he could not produce a single name to

substantiate his testimony. In effect, he could only recall what he "heard" in the back of the hall during town meetings. Mr. Ferrara's remarks amounted to no more than political invective and expressions of personal anger at Mr. Bougere; they consisted of gross hearsay rumors.

The jury found that the remarks were made by an individual, outside of the scope of his duties, with the "avowed purpose of causing injury to the plaintiff because of a personal vendetta which has nothing to do with the response made in connection with his office of the Mayor of the City of Harahan".[2]

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's decision ignores this Court's decision in Hafer v. Melo, 112 S.Ct. 358 (1991). Hafer holds that a

---

[2]Quoting the actual jury instructions.

public official does not enjoy absolute immunity from personal liability for tortious conduct occuring within the officer's official capacity. The Fifth Circuit in this case, App. B, held that a state officer is absolutely immune from defamatory statements made while acting in his official capacity. Moreover, the Fifth Circuit summarily reversed the jury's finding that Ferrara acted outside his scope of duty by holding course and scope to be purely a question of law.

ARGUMENT

The Fifth Circuit's decision is contrary to, and ignores, the U.S. Supreme Court in Hafer v. Melo[3] and decisions of the Fifth Circuit and former Fifth Circuit, in Stepanian v. Addis, 699 F.2d 1046 (11th Cir. 1983) and Marrero v. City

---

[3] 112 S.Ct. 358 (1991).

of Hialeah, 625 F.2d 499 (5th Cir. 1980), cert. denied, 450 U.S. 913. These cases establish that:

(1) there is no absolute immunity for state officials.

(2) scope of duty of an elected official is a fact question.

A. Absolute Immunity

The Fifth Circuit panel decision erroneously holds: " Mayor Carlo Ferrara's publications were made within the course and scope of his authority and were absolutely privileged." This holding fails to acknowledge the recent holding in the analogous 42 U.S.C. Section 1983 case of Hafer v. Melo, 112 S.Ct. 358 (1991), and cases cited therein.

Hafer v. Melo involved a claim brought pursuant to 42 U.S.C. § 1983 against Mrs. Melo, the newly-elected

Auditor General of Pennsylvania. Following her election, Mrs. Melo fired several state employees and they sued her, claiming money damages. The District Court dismissed these claims, stating that Hafer could not be held personally liable for employment decisions made in her official capacity. The Court of Appeals reversed and the Supreme Court granted review and held:

> We hold that state officials, sued in their individual capacities, are "persons" within the meaning of Section 1983. The Eleventh Amendment does not bar such suits, nor are state officers absolutely immune from personal liability under Section 1983 solely by virtue of the "official" nature of their acts. Id. at 365.

This holding was reached after close

analysis of a prior decision of the Supreme Court addressing the subject of immunity for government officials. The Hafer Court continued:

> This Court has refused to extend absolute immunity beyond a very limited class of officials, including the President of the United States, legislators carrying out their legislative functions, and judge carrying out their judicial functions . . . . State executive officials are not entitled to absolute immunity for their official actions. In several instances, moreover, we have concluded that no more than a qualified immunity attached to administrative employment decisions, even if the same official has absolute immunity when performing other functions. Id. at 364 (Citations omitted; emphasis added).

The holding in the Hafer case should be applied to the case before this Court. Although Hafer was brought pursuant to 42 U.S.C. § 1983, we will demonstrate below the dependence on § 1983 decisions in the context of federal defamation cases. We will further show that Gary Bougere's case fails to follow, or even acknowledge, the Hafer decision and other Fifth Circuit decisions. This failure places the Fifth Circuit decision in direct opposition to a previous panel decision of the Fifth Circuit and to Supreme Court case law.

B. Scope of Duty

The Fifth Circuit panel decision erroneously holds: "Whether the communication was made within the scope of the official's duties is a question of law for the court to determine." Dugas, et al v. City of Harahan, 978 F.2d 193 (5th Cir.

1992). This is contrary to Fifth Circuit and Former Fifth Circuit rulings.

Stepanian v. Addis holds that whether a public official has exceeded the scope of his authority is a fact question. In that case, Addis, a U.S. Attorney, was sued for slander by the plaintiff in connection with statements he made at a press conference. Addis brought a Motion for Summary Judgment before the District Judge which was granted on the basis of prior jurisprudence. Shortly after the case was dismissed, however, the Fifth Circuit (former Fifth) decided Marrero v. City of Hialeah. Thereafter, the District Judge in the Stepanian case vacated his prior dismissal, sua sponte, and reinstated the original cause of action.

For the second time, Addis moved for summary judgment asserting absolute

immunity and the district judge certified the case to the Fifth Circuit.[4] The Fifth Circuit (by this time the Eleventh Circuit) held: "Whether Addis exceeded the scope of his authority in making particular statements was a disputed issue of material fact." Stepanian, 1049 (Emphasis added).

The Marrero case involved a state prosecutor who was sued for damages pursuant to 42 U.S.C. § 1983. The state prosecutor was alleged to have defamed the plaintiff at a news conference. The Marrero court held that state officials are only entitled to a qualified good faith immunity when they engage in activities outside their scope of

---

[4] In the instant case, the District Judge certified the question to the Fifth Circuit after he had denied the defendants' second motion for summary judgment on grounds of absolute immunity.

authority. The significance of Marrero is that the Fifth Circuit, in deciding matters involving Florida law in a defamation action, turned to an action brought under 42 U.S.C. Section 1983 for authority. Stated another way, damages for defamation and damages for Section 1983 cases are closely analogous.

The Stepanian and Marrero cases are important to this application for writ of certiorari in that:

(1) scope of duty is a fact question; and

(2) analogous 42 U.S.C. §1983 cases are relevant and precedential in defamation cases.

C. Jury Verdict Supported by Substantial Evidence

The Fifth Circuit's summary reversal of the Jury's finding that Ferrara

exceeded the scope of his authority also disregards substantial evidence regarding the facts and circumstances surrounding this issue. It implies that Ferrara acted within the scope of his duty simply because he was mayor. In effect, it pretermits the issue entirely by implication for it means that Ferrara could not ever exceed his scope of duty when acting in his capacity as Mayor.

The Fifth Circuit's error is best demonstrated through appreciation of the extent to which Ferrara's response to the FBBE was based upon personal opinion unconnected to Harahan or his office as Mayor. If Ferrara's response was an official act of the mayor, then anyone who happened to be mayor at the time should have been able to do what he did. But this is not the case. Only Carlo Ferrara

could have prepared the response he sent to the FBBE, because, by his own admission, the response was not based on personnel records or, for that matter, on any records, of the City of Harahan.[5] In fact, Ferrara's response had nothing whatsoever to do with Bougere's employment by the City of Harahan. His response was not due to his position as mayor, but was derived wholly from his observations and from his political differences with Bougere at a time when Ferrara was only a private citizen who had no supervisory responsibilities whatsoever over Bougere.

D. Protection of Public Good Does Not Require Absolute Immunity

Protection of vital state interests

---

[5] He had the audacity to tell the FBBE that Mr. Bougere was mentally disturbed simply because Ferrara thought Bougere drank too much water.

is a public goal, but this protection should not extend so far as to exonerate a person guilty of maliciously defaming another. The Fifth Circuit cited an "authorization and release" form executed by Bougere authorizing the Board to investigate his past, but failed to recognize that it released only those who complied "in good faith" with the FBBE's investigation. Any protection accorded Ferrara should have been conditioned upon his good faith belief that the information was true. In this case, Ferrara's response was submitted in utter disregard of the truth, in bad faith, and (as the jury found) maliciously, with the avowed purpose of causing injury to Bougere because of a personal vendetta. As such, the interests of the FBBE must bow to society's need to protect its citizens

from evil and malicious slander.

Instead of balancing state and societal interests, the Fifth Circuit completely ignored the latter. It found Ferrara's response served "the important public function of aiding the Board in its obligation to insure Bougere's good character and fitness." Such a finding is nonsensical. Slander cannot conceivably be found to serve any important public function or interest. To the contrary, it makes a mockery of the Board's public function and denigrates the whole purpose of the inquiry.

CONCLUSION

Ferrara's response was malicious and was based neither upon his position as Mayor nor upon Harahan records. To allow Ferrara to hide behind a shield of absolute immunity simply because his

response was written on Harahan stationery at a time when he happened to be mayor would grant a public official an unlimited right to defame and would constitute a denial of stare decisis. His response served no public purpose, nor furthered any legitimate public interest; it deserves no protection by this Court.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted.

Regel L. Bisso
Bar No. 3088
610 Baronne St.
New Orleans
Louisiana 70113
(504) 524-6221

Bonnie L. Zakotnik
Bar No. 13775
4501 Canal Street
New Orleans
Louisiana 70119
(504) 486-6011

APPENDIX A

IN THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

NO. 92-3013

SUSAN DUGAS, PLAINTIFF
GARY M. BOUGERE, PLAINTIFF-APPELLEE,

VERSUS

THE CITY OF HARAHAN, LOUISIANA, ET AL
DEFENDANTS

CARLO F. FERRARA, DEFENDANT-APPELLANT.

Appeal from the United States District
Court for the Eastern District of
Louisiana

ON SUGGESTION FOR REHEARING EN BANC

(Opinion November 27, 5 Cir., 1992,
___F.2d _____)

(January 4, 1993)

Before HIGGINBOTHAM, SMITH and DeMOSS,
Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggesting for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it

(Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

APPENDIX B

SUSAN DUGAS, PLAINTIFF,

GARY M. BOUGERE, PLAINTIFF-APPELLEE,

V.

THE CITY OF HARAHAN, LOUISIANA,

ET AL, DEFENDANTS,

CARLO F. FERRARA, DEFENDANT-APPELLANT.

NO. 92-3013

SUMMARY CALENDAR.

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT.

NOV. 27, 1992

APPEAL FROM THE UNITED STATES DISTRICT

COURT FOR THE EASTERN DISTRICT

OF LOUISIANA

Before HIGGINBOTHAM, SMITH, DEMOSS, Circuit Judges.

DeMOSS, Circuit Judge:

BACKGROUND

On January 1, 1987, Bougere was sworn into the office of mayor of the City of Harahan in Louisiana. He resigned from office approximately one year later due to a political dispute involving his recall. Bougere and his wife subsequently moved to Florida. On or about January 5, 1989, Bougere applied to the Florida Board of Bar Examiners for admission to the Florida Bar. As a condition of admission, Bougere executed an "Authorization and Release" form, authorizing the Board to investigate Bougere's character and fitness.[1]

---

[1]The Authorization and Release form contains the following provision:

In a letter dated January 10, 1989, the Board contacted the City of Harahan, as a past employer of Bougere, seeking information concerning Bougere's character and fitness.[2] At that time,

---

> I hereby release and exonerate every medical doctor, school official and every other person, firm, officer, corporation, association, organization or institution which shall comply in good faith with the authorization and request made herein from any and all liability of every nature and kind growing out of or in anywise pertaining to the furnishing or inspection of such documents, records and other information or the investigation made by said Florida Board of Bar Examiners. The undersigned further waives absolutely any privilege he may have relevant to his good moral character and fitness to perform the responsibilities of an attorney under Section 90.503 Florida Statutes.

[2]The letter contained the following language:

> The applicant has authorized all sources having information

Ferrara was the mayor of Harahan. The letter was partly composed of a questionnaire which asked the city to check "yes" or "no" boxes in response to relevant questions pertaining to Bougere's character and fitness, contained therein.

> relative to the character and fitness of the applicant to cooperate with the Board by making that information available to the Board by making that information available to the Board and has released and exonerated all sources from any and all liability of every nature and kind pertaining to the furnishing of information to the Board.
>
> The Board sincerely appreciate your cooperation in completing this form and assures you that the information furnished by you will be revealed to no one not authorized by the Rules of the Supreme Court of Florida Relating to Admissions to the Bar.

In his City Hall office, Ferrara complied with the Board's request and checked the relevant boxes, drafted a letter on City of Harahan stationary discussing his contacts with and opinions of Bougere, and signed the questionnaire as Mayor of the City of Harahan. On January 19, 1989, Ferrara returned both documents by mail to the Board. Ferrara further discussed his contacts with and opinions of Bougere on May 24, 1989 when the Board sent an investigator to Louisiana to interview Ferrara. The Board held an evidentiary hearing on Bougere's application and ultimately approved his admission to the Florida Bar.

Bougere and his wife Dugas, filed the instant action on January 12, 1990, in the United States District Court for

the Eastern District of Louisiana, alleging Ferrara's response to the Board's letter and statements to the investigator were defamatory, resulting in various injuries to Bougere.[3] The record reflects that Bougere's sole basis for his action is Ferrara's contacts with the Board. Ferrara unsuccessfully argued to the district court that his communications with the Board were absolutely privileged due to both his status as a mayor and as a participant in the Board's investigation of Bougere's character and fitness. At the conclusion of a four day trial, the jury returned a

---

[3]Pursuant to Jagers v. Royal Indemnity Co., 276 So.2d 309 (La. 1973), the district court determined that Florida's interest in the application of its law to this action was superior to Louisiana's and, consequently, applied Florida law. Neither party challenges the court's determination on appeal.

verdict in favor of Bougere and against Ferrara, awarding $75,000 in actual damages and an additional $25,000 in punitive damages. The district Court entered judgment on the verdict.

Ferrara appeals, arguing his communications with the Board were absolutely privileged, that Bougere failed to prove Ferrara's statements were false and made with actual malice, and that Bougere failed to prove that he suffered any damages as a result of the alleged defamatory statements.

A. Privilege Based on Speaker's Status as a Public Official

[1,2] The Florida Supreme Court has held that defamatory publications by executive officials of government are absolutely privileged if they are made in connection with the performance of their

official duties and responsibilities. McNayr v. Kelly, 184 So.2d 428, 433 (Fla. 1966). The privilege attaches to communications by public officials no matter how false, malicious or badly motivated the communication may be. Id. at 430. The alleged defamer's good faith or regard for the truth, therefore, is irrelevant. See Barr v. Mateo, 360 U.S. 564, 575, 79 S.Ct. 1335, 1341, 3 L.Ed.2d 143 (1959); Id. The privilege attaches to such communications regardless of whether they were made in connection with a mandatory duty of the speaker or were merely the results of his discretionary acts. City of Miami v. Wardlow, 403 So.2d 414 (Fla. 1981), citing Barr, 360 U.S. at 575, 79 S.Ct. at 1341. Florida courts have extended the privilege to several categories of executive branch

employees. Id. 403 So.2d at 416-7 (extending to a deputy police commander of the city of Miami); McNayr, 194 So.2d 428 (extending to a county manager); Skoblow v. Ameri-Manage, Inc., 483 So.2d 809 (Fla. 3rd. Dist. Ct. App. 1986) (extending to employees of a state hospital); Kribs v. City of Boynton Beach, 372 So.2d 195 (Fla. 4th Dist. Ct. App. 1979) (extending to a city manager); Densmore v. City of Boca Raton, 368 So.2d 945 (Fla. 4th Dist. Ct. App. 1979)(extending to a city manager); Johnsen v. Carhart, 353 So.2d 874 (Fla. 3rd Dist. Ct. App. 1977) (extending to an assistant state attorney).

[3] The controlling issue in deciding whether an executive employee is immune from defamation actions is whether the communication was within the scope of

the official's duties. Skoblow, 483 So.2d at 811. Whether the communication was made within the scope of the official's duties is a question of law for the court to determine. See Barr, 360 U.S. 564, 79 S.Ct. 1335. Florida courts give a broad definition to the term "scope of duties" and its synonyms. Mueller v. Florida Bar, 390 So.2d 449, 451 (Fla. 4th Dist. Ct. App. 1980).

In Wardlow, the Florida Supreme Court held that allegedly slanderous statements by a City of Miami police internal security officer (Murphy) to a captain of the City of Key West police department concerning a former Miami police officer (Wardlow) were absolutely privileged. Wardlow, 403 So.2d at 416. The Key West police captain called the Miami police department to inquire about

the background of Wardlow, who had applied to the Key West police department for employment. Id. at 415. In response to the inquiry, Murphy made several statements which Wardlow considered to be slanderous. Id. After noting that there was no administrative rule requiring Murphy to explain the circumstances under which Wardlow left his job, the court stated the following:

> [w]hile the communication at issue here was privately made, as distinguished from the situation in Barr v. Mateo, we perceive that an important public function was involved. Murphy's job involved attempting to ensure that no unfit persons were allowed to serve as police officers in the

> City of Miami. An ancillary function, but very important to the public, would be to communicate the results of his department's investigations to inquiring officials from another municipal police department.

Id. at 416.

In Johnsen, the court held that a state attorney who had prosecuted Johnsen for several crimes involving moral turpitude and subsequently sent an allegedly defamatory letter to the Miami police department, expressing the attorney's reservations about the plaintiff's fitness to serve as a policeman, was absolutely immune from defamation liability because he acted in the interest of the public good.

Johnsen, 353 So.2d at 875, 877. The court stated the letter "was something done for the public good and for the purpose of benefiting and enhancing the proper prosecution of criminal offenses." Id. at 877.

In Mueller, the court held that the Florida Bar's staff counsel's dissemination of a press release concerning the plaintiff's disbarment was absolutely privileged. Mueller, 390 So.2d at 452. The court stated:

> It was clear within the scope of the authority to staff counsel to advise not only appellant's clients but also his prospective client's of appellant's disbarment. The latter category consists of public at large. Thus dissemination of the press release was in the interest of

> the public good and therefore absolutely privileged.

Id.

In Skoblow, the court held that allegedly defamatory statements made by several state hospital officials to the Miami Herald newspaper concerning a dentist who had been discharged from the hospital were absolutely privileged. The court stated:

> [i]n the present case, all the defendants alleged to have defamed the plaintiff either had official supervisory responsibilities over the plaintiff or had responsibilities regarding personnel matters or community relations. Since the statements made concerning the plaintiff's discharge were related to and made within the scope of the defendants'

official duties, we hold that these defendants are entitled to an absolute privilege and are, therefore, immune from liability for the alleged defamation. Id.

[4] In sum, communications by a public official are made within the scope of his duties if they involve an important public function, further the interest of public good, or if the public official exercised supervisory responsibilities over the alleged victim, or over personnel matters or community relations. In either of these circumstances, Florida law extends an absolute privilege to the communications.

[5] Ferrara's communication with the Board clearly involved an important public function and furthered the interest of public good. The public good

involved here is Florida's vital interest in ensuring that only those applicants who are of good character and fitness be admitted to the Bar. When Ferrara, a public official, responded to the Board's efforts to protect this vital interest, his response served the important public function of aiding the Board in its obligation to ensure Bougere's good character and fitness. Although the facts do not reflect Ferrara ever exercised supervisory responsibilities over Bougere, or that his statements involved community relations in Harahan, his mayoral position necessarily bestowed upon him the authority to exercise supervisory responsibility over personnel matters. When the Board requested the City of Harahan to provide information concerning a former mayor, Ferrara

clearly had the authority to respond to the letter on behalf of the City. Although Ferrara's response on behalf of the city was not mandated, it was clearly made within the realm of the mayor's discretionary authority. Accordingly, we hold his response is absolutely privileged.

B. Privilege Based on Speaker's Status as a Participant in a State Bar's Investigation of an Applicant

[6] Although no Florida court has directly addressed the issue of whether communications by individuals to the Board of Bar Examiners concerning the character and fitness of one of its applicants are absolutely privileged, it is clear that the Florida Supreme Court has established the Florida Board of Bar Examiners as an arm of the court to

assist the court in exercising exclusive jurisdiction over the admission of persons to the practice of law; that Florida has a compelling state interest in ensuring that only those fit to practice law are admitted to its Bar; and that it is imperative for the protection of the public that applicants to the Bar be thoroughly screened by the Board. Florida Board of Bar Examiners re: Applicant, 443 So.2d 71, 74 (Fla. 1983). Moreover, statements by parties who lodge a complaint against a member of the Florida Bar are absolutely privileged. Stone v. Rosen, 348 So.2d 387, 389 (Fla. 3rd. Dist. Ct. App. 1977).

In the only opinion which we could find directly on point, an Illinois Court extended an absolute privilege to communications by individuals to a state

bar committee investigating the character and fitness of a bar applicant. Kalish v. Illinois Education Association, 157 Ill. App. 3d 969, 110 Ill. Dec. 72, 79, 510 N.E.2d 1103, 1110 (1st Dist. 1987). In Kalish, the Illinois Education Association (IEA) allegedly responded to the Illinois' Bar Character and Fitness Committee's request for information concerning the character and fitness of Kalish. Id. 157 Ill. App. 3d 969, 10 Ill. Dec. at 73, 510 N.E. 2d at 1104. After Kalish experienced difficulties in his admissions process, he sued the IEA for providing allegedly defamatory information to the Committee. Id. 157 Ill. App. 3d 969, 10 Ill. Dec. at 74, 510 N.E.2d at 1105. The sole issue on appeal of the dismissal of Kalish's action was whether the Character and Fitness

Committee was a quasi-judicial body, thereby entitling the IEA to an absolute privilege for statements made in response to the Committee's inquiry about Kalish's character and fitness. Id. The court held that the Committee was a quasi-judicial body, and therefore, the IEA's response was absolutely privileged. Id. 157 Ill. App. 3d 969, 10 Ill. Dec. at 77, 79, 510 N.E.2d at 1108, 1110.

In reaching this conclusion, the court recognized the vital importance of ensuring good character of Illinois' Bar applicants and that "important public policy considerations support the granting of an absolute privilege to communication with the Character and Fitness Committee." Id. 157 Ill. App. 3d 969, 10 Ill. Dec. at 78, 510 N.E.2d at 1109. The court continued as follows:

An applicant for admission to the bar must establish to the satisfaction of the Committee that he possesses the good moral character and general fitness required or an attorney to practice law. Because character and fitness committees lack the personnel and other resources to conduct independent investigations of bar applicants, they are obliged to rely primarily on truthful answers by the applicants to committee questionnaires as a source of material information. An essential source of such information is the applicant's former employers. The Committee's ability to obtain frank and candid evaluations of an applicant's moral character,

> reputation and fitness for the practice of law would be seriously jeopardized if employers were exposed to retaliatory libel actions be disgruntled applicants. We do not believe that a qualified privilege would provide adequate protection.
>
> . . .[W]e believe that persons having relevant information should be encouraged to impart it and should be free to speak freely, unfettered by fear of being held to respond in damages.

Id. (citations omitted)

As indicated above, it is vitally important for Florida to ensure the good character and fitness of its Bar applicants. To this end, the Florida Supreme Court established the Board as an

arm of the court to thoroughly screen Bar applicants. An essential element of the Board's screening process is the solicitation of information from applicant's former employers. The letter which the Board sent requesting information about the applicant expressly represented that the applicant had "released and exonerated" all respondents to such request for information. If these employers were not absolutely immune from defamation liability for statements bearing upon a Bar applicant's character and fitness, they would shrink from the Board's request for such information. In that event, Florida's vitally important interest in ensuring an applicant's character and fitness would be thwarted. Therefore, to preserve this

interest, an absolute privilege should be extended to such communications.

Recognizing that Florida extends an absolute privilege to statements by parties who lodge a complaint against a member of the Florida Bar provides an analogous rationale for finding such a privilege in this case. In Stone v. Rosen, the court rejected the application of a qualified privilege to statements by parties who lodge a complaint against a member of the Florida Bar and held that such statements were absolutely privileged. Stone, 348 So.2d at 389. In reaching this conclusion, the Florida court provided the following rationale:

> [m]embers of the legal profession are accorded rights and privileges not enjoyed by the public at large; the acceptance of these carries with

> it certain responsibilities and obligations to the general public. For the sake of maintaining the high standards of the profession and disciplining those who violate the Canons of Legal Ethics, one who elects to enjoy the status and benefits as a member of the legal profession must give up certain rights or causes of action which, in this instance, is the right to file an action against a complainant who lodges an unsuccessful complaint with the Grievance Committee of the Florida Bar.

Id.

Because it would be inconsistent with the rationale in Stone to accord a lesser privilege to communications with the Board of Bar Examiners, we hold

absolute privilege must be extended. We are comfortable that in so holding we are reaching the same conclusion the Florida Supreme Court would reach if this issue were directly before it.

CONCLUSION

We reverse the judgment of the district court and render judgment that Appellee take nothing herein.

Costs assessed against Appellee.

APPENDIX C

MINUTE ENTRY

DECEMBER 23, 1991

SCHWARTZ, J.

DUGAS, ET AL CIVIL ACTION

VERSUS NO. 90-0150

CITY OF HARAHAN, ET AL SECTION "A"

This matter is before the Court on the defendant's Motion for Judgment Notwithstanding the Verdict.[1] The matter, set for hearing on December 18, 1991, was taken under submission without oral argument.

---

[1]Effective December 1, 1991, Fed. R. Civ. Pro. 50 was revised to eliminate any reference to a "judgment notwithstanding the verdict." The presently effective revisions provide instead for a judgment as a matter of law. The advisory committee notes to the revised article indicate that there is no change in the existing standard for determining whether the movant is entitled to judgment as a matter of law.

The plaintiff, Gary Bougere, the ex-Mayor of the City of Harahan, sued for defamation in connection with certain statements made by Carlo Ferrara, the current Mayor of Harahan, to the Florida Bar Association regarding plaintiff's application for admission to the Florida bar.[2] The jury was selected on October 31, 1991 and the trial commenced on November 4, 1991. On November 5, 1991, the jury returned a verdict in favor of the plaintiff and against the defendant, Carlo Ferrara, and awarded plaintiff damages in the amount of $75,000 for defamation and further found on the punitive damage claim that the plaintiff is entitled to an additional $25,000.

---

[2]The plaintiff sued both Carlo Ferrara, personally, and the City of Harahan.

The jury exonerated the other defendant, the City of Harahan.

Essentially, the defendant's arguments for post-trial relief are three-fold: (1) the Mayor of Harahan, as a governmental official acting within the scope of his official duties, had absolute immunity; (2) plaintiff failed to prove by clear and convincing evidence that he acted with **actual malice** when making the "defamatory" statements; and (3) plaintiff failed to offer any evidence that he suffered damages as a result of the "defamatory" statements.

The defendant has not met his burden under Maxey v. Freightliner Corp., 665 F.2d 1367, 1371 (Former 5th Cir. 1982) (En banc) (emphasis added), to wit: "[J]udgment n.o.v. should be granted only when the facts and inferences point so

strongly and overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary verdict."

Sufficient evidence was adduced at trial for the jury to find that Carlo Ferrara acted outside the scope of his duties as mayor;[3] and thus, he was not entitled to immunity for his defamatory statements.[4] Carlo Ferrara contends that

---

[3]Under Florida law, "the controlling factor in deciding whether a public employee is absolutely immune from actions for defamation is whether the communication was within the scope of the officer's duties." City of Miami v. Wardlow, 403 So.2d 414, 415-16 (Fla. 1981).

[4]It should be noted that the present immunity argument is the same one this Court denied on summary judgment. Further, subsequent to this Court's denial of the defendant's motion for summary judgment the United States Supreme Court held: "State executive officials are not entitled to absolute immunity for their official actions." Hafer v. Melo, 112 S.Ct. 358, 364 (1991). Although that case involved a Section 1983 claim, the court held a state

he "proved that his statements regarding the plaintiff were true." However, as shown by its verdict, it is apparent that the jury was of the opposite opinion. There were flimsy[5] and contradictory[6]

---

official could be personally liable for damages based upon actions she took in her official capacity. Thus, Carlo Ferrara, even if he was acting in his official capacity as the Mayor of Harahan, which the jury found he was not, is not entitled to absolute immunity.

[5]For example, Mr. Ferrara's testimony that the plaintiff had a drinking problem (i.e., he was an alcoholic), was based on: (1) his observation that the plaintiff consumed a great deal of water at city council meetings and (2) hearsay that the plaintiff was hospitalized and was assigned a room in the wing of the hospital where treatment was provided to alcoholics.

[6]The plaintiff testified he was hospitalized for medical reasons having nothing whatsoever to do with any alleged drinking problem. Further, there was no evidence that the wring of the hospital in which the plaintiff was assigned a hospital room was dedicated solely for patients undergoing alcohol abuse treatment.

testimony and evidence which would enable the jury to conclude that the Mayor's defamatory statements were both untrue and malicious. In fact, if this was a bench trial, this Judge would have come to the same conclusion.

The plaintiff did not prove lost job opportunities, and, thus, was not entitled to special damages for lost wages. However, he is entitled to general damages that are inherent in a defamation suit, including injury to the plaintiff's reputation, health, shame, humiliation, mental anguish, and hurt feelings experienced in the past or to be experienced in the future. The testimony of the plaintiff and his wife permitted the jury to conclude that the plaintiff suffered all of such. The award of $75,000 in general damages is well within

the amount that could be awarded to compensate plaintiff. Also, the $25,000 awarded in punitive damages is certainly not in excess of an amount that would be appropriate to deter future similar conduct.

Accordingly, the defendant's Motion for Judgment Notwithstanding the Verdict is **DENIED.**

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

SUSAN DUGAS, ET AL	CIVIL ACTION
VERSUS	NO. 90-0150
CITY OF HARAHAN, ET AL	SECTION "A"

JUDGMENT

Considering the verdict rendered by the jury;

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of Gary M. Bougere and against defendant Carlo R. Ferrara in the amount of $100,000, together with legal interest from date of judgment until paid, defendant to bear all costs, except as to the claim of Susan Dugas.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that there be judgment in favor

of defendant City of Harahan, Louisiana and against the plaintiff Gary M. Bougere, dismissing with prejudice plaintiff's claim against said defendant.

AND FURTHER, the Court having previously granted the motion of defendants for summary judgment, as to Susan Dugas,

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of the defendants, City of Harahan, Louisiana and Carlo R. Ferrara, and against the plaintiff, Susan Dugas, dismissing with prejudice plaintiff's claims against said defendants, plaintiff Susan Dugas to bear all costs incurred as to her claim.

New Orleans, Louisiana, this 8th day of November, 1991.

_____

LORETTA G. WHYTE, CLERK

By:_____

Denny P. Descant

Chief Deputy Clerk

APPROVED AS TO FORM:

_____

UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

SUSAN DUGAS, ET AL	CIVIL ACTION
VERSUS	NO. 90-0150
CITY OF HARAHAN, ET AL	SECTION "A"

INTERROGATORIES

1. Is the defendant, Carlo R. Ferrara, guilty of defaming the plaintiff, Gary Bougere, in a manner that caused injury to the plaintiff?

Yes __X__ No _____

Proceed to question No. 2.

2. Is the defendant, the City of Harahan, guilty of defaming the plaintiff, Gary Bougere, in a manner that caused injury to the plaintiff?

Yes ___ No __X__

If your answers to either Question Nos. 1 and/or 2 were "Yes," please proceed to Question No. 3.

If your answers to Questions Nos. 1 and 2 were both "No," please skip the remaining questions, then date and sign this form, and return to the Courtroom with your verdict.

3. What amount, if any, do you find will fairly and adequately compensate Gary Bougere for any injury to his reputation or health and any shame, humiliation, mental anguish, and hurt feelings experienced in the past or to be experienced in the future?

$75,000.00

Please proceed to Question No. 4.

4. Do you find the defendants liable, by clear and convincing evidence, for punitive damages?

Yes __x__ No _____

If your answer to question No. 4 is "Yes," then proceed to Question No. 5.

If your answers to Questions No. 4 is "No," then date and sign this form, and return to the Courtroom with your verdict.

5. What amount, if any, do you find is appropriate to award Gary Bougere for punitive damages?

$25,000.00

Please date and sign this form, and return to the Courtroom with your verdict.

Nov. 5, 1991 _____

DATE FOREPERSON